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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Robert M. Illman, Magistrate Judge

AMY, et al., Plaintiffs, VS. RANDALL STEVEN CURTIS, Defendant.	**NO. C 19-02184 PJH/RMI**

San Francisco, California
Thursday, September 3, 2020

TRANSCRIPT OF TELEPHONIC PROCEEDINGS OF THE OFFICIAL ELECTRONIC SOUND RECORDING

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United States Official Court Reporter

Thursday - September 3, 2020

P R O C E E D I N G S

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THE CLERK: Court calls civil case number C19-2184 PJH/RMI, Amy, et al. versus Curtis.

Parties, state your appearances for the record, please.

MR. KAWAI: Good morning, John Kawai for Plaintiffs.

MS. HEPBURN: Good morning, Carol Hepburn for Plaintiffs.

MR. BALOGH: Good morning. This is Ethan Balogh for Defendant Randall Curtis.

MS. SUGINO: Good morning. This is Narai Sugino for Defendant.

THE COURT: All right. Good morning, everyone.

We are here on the parties' joint discovery letter brief. So I guess I would like to hear from Plaintiffs first.

MS. HEPBURN: Yes, Your Honor. This is Carol Hepburn.

Discovery has its limits. And this Court has inherent power to enforce appropriate limits.

We cited the *Hickman versus Taylor* case for the language that discovery like all matters of procedure has ultimate and necessary boundaries. Where there is oppression or where it ventures into the irrelevant or encroaches on recognized domains of privilege, it needs to be limited. And we believe the discovery requested here crosses the limit.

Now, the Court did enter a prior discovery order on November 8th of 2019 in this case, and that prior order allowed absent countervailing circumstances, depositions of adults. There was no request at that time for minors, and the Court did not allow deposition of minors at that time.

And that was based upon the issues of identity and that Plaintiffs need to prove that they are the people who are in the images depicted in Defendant's collection and that there were punitive damages in the case at that time.

Since that time, Plaintiffs sought permission and were allowed to file their First Amended Complaint which did remove punitive damages from the case.

So here, we are left with the element of identity, which is Plaintiffs' position. And we -- there are three bases upon which it is our assertion that we need not prove an amount of damages.

That is the statutory language that provides the option for liquidated damages, which is a truncated process. It should be. And there is no quantity of injury that need be proven per the language of the statute.

Also, the second basis is case law which gives us guidance and which has been found that victims are harmed by every possessor of their child sex abuse material.

And also the third basis is the order of restitution which was entered in the underlying criminal case.

So if we start by looking at the statute, we see that it is phrased in the disjunctive in terms of the damages allowed. There are liquidated damages, which Plaintiffs may prove or there are actual damages; one or the other.

Plaintiffs have proved here -- excuse me -- Plaintiffs have chosen here to go for liquidated damages. That is Plaintiffs' choice. It is not Defendant's choice.

And the Defendant's request for discovery here -- and most egregiously their request to depose the minors in these circumstances -- would undo Plaintiffs' choice. There is a reason that Congress allowed this choice. And this discovery would undo that option.

And it doesn't make sense for Congress to give the victims of child sex abuse a truncated option for damages and then allow the full gamut of discovery, which consumes the parties' time and money, the Court's time and resources at trial and inflicts further damages on these victims.

Now, there is one circuit court -- and the only one that we could find -- has said: No, this doesn't make sense. There is no point to make the victim prove an amount of damages only to have the Court then award the minimum statutory amount.

And that is the case of *Doe versus Boland* down at the Sixth Circuit which we provided in our letter. We acknowledge that arose under a different procedural posture than we have here.

Neither Counsel could find a case under Section 2255 about discovery, but what is pertinent about *Doe versus Boland* is that it does discuss personal injury and the personal injury element, which is he, here -- Defendant bases his claim for this discovery on our need to prove personal injury and, therefore, damages.

But the *Boland* discussion of personal injury is pertinent in that there was no discussion in the case about proof in the record. If the Court will recall, this is a case where an expert witness morphed photos -- stock photos of children onto pornography.

THE COURT: Right.

MS. HEPBURN: And the Court in *Boland*'s discussion looked at prior case law. It looked to the case of *New York versus Ferber* which discussed the nature of injury to child pornography victims. It looked to a tax case, *US v. Bert*, you know, what is personal injury under Section 104 of the tax code.

And there was no question in the Court's mind in *Boland* that these children, who had been sexually abused and had images created, were harmed by Mr. Boland, who had created these pictures. And, remember, these kids in *Boland* were never sexually abused like our Plaintiffs here.

Now, this was a 2012 decision. It was before the *Paroline* case in 2014 which rose under Section 2259 of Title 18

concerning restitution for child porn victims; but, again, injury and causation were a primary focus of the Supreme Court in *Boland*.

And that was a case where Amy, who is also a Plaintiff here, was held by the Court clearly to be injured by someone who was a possessor of two images of her, who did not know her. She didn't know beforehand.

And yet the Court said clearly that she was injured and that any possessor of child sex abuse material injures the child who is depicted in that. The facts are on point with this case.

And 2259 and 2255 are two parts of the structure of remedies that Congress has provided for children who are victims of child pornography crime, and it makes clear that discovery on injury here is not a -- an element of this case.

And then, after *Paroline*, we have Congress issuing findings in 2018 in the Amy, Vicky and Andy Act finding that every person who possesses child pornography harms the victims.

So, therefore, we believe that we do not need to prove an amount of damages in this case. That as a matter of law, if we prove that these Plaintiffs are the victims who were depicted in Mr. Curtis' collection, then they are harmed as a matter of law.

So my third point is the underlying restitution order in the criminal case, and that is because that order necessarily

had defined that the victim in the Vicky series, the victim in the Misty series, et cetera, were necessarily harmed, whoever those victims might be.

Now, it is our task here to prove who those victims are and that they are our Plaintiffs. But that was necessarily a finding that those victims were harmed, and we acknowledge that Counsel astutely reserved the identity issue.

He didn't reserve any injury issue, and, in fact, don't believe that he could because the Court couldn't enter an order of restitution without it necessarily finding that the victims had losses.

So for all of these reasons, we believe that discovery and the issues of damages is not at all appropriate because as *Boland* said once a child has shown she is a victim of a sex crime, there is just little point in having to prove an amount of damages.

So the requested discovery goes into the prior restitution request which we submit are over burdensome and of little relevancy here. Again, our only issue is identity.

And the -- the production of these letters would take hundreds of hours of staff and attorney time. We have already provided Counsel with all of the forensic reports, which we have for all of the victims. We have been trying to work cooperatively in discovery and have -- Plaintiffs have provided many documents to Defendant.

The letters that Mr. Curtis received in the course of the restitution inquiry in his underlying case are very much the standard letters that are sent out in these matters. So there is not much variation that is going to be found in all of the letters that are requested for.

And, again, where there is no proof of actual damages required, these are of little or no relevance.

And, Your Honor, our final point is proportionality. We believe that the depositions and the encouraging into the counseling and school records of these Plaintiffs are disproportional and that injury will surely be inflicted by the depositions.

We have provided the declaration of Dr. Cooper -- Sharon Cooper, who is literally world-renowned. She has trained law enforcement and therapists and people in the court system all over the world on the effect on victims of child sex abuse material exploitation. And she has outlined for the Court all of the -- the serous psychological, medical problems that are ongoing conditions.

And I think -- if I can say it -- it is important to remember that these victims are different than other crime victims. These are victims who suffer ongoing continuing crimes every day and they know that.

They walk down the street, and they don't know who that they pass may be someone who has viewed their sex abuse images.

Many of them look like they did in those images, and they are afraid of recognition.

Dr. Cooper talks about the problem disassociation as does Lily, one of the Plaintiffs herein. And these cases are just different because this is a present tense ongoing crime.

And so the likelihood of injury in deposition is just that much more salient. Child pornography creates a many headed Hydra that torments its victims.

And I must focus also on the minors. Court -- excuse me -- Defendant has alleged that supposedly the Court has decided these issues twice before. That is simply wrong.

I have provided the transcript of the first instance where he said that the Court decided. And Defense Counsel shot from the hip. And at the end of our 12(b)6 motion, there was no notice. There was no briefing. In the comments by the Court indicated that there would be depositions.

But then we have the order -- again, which was entered before the First Amended Complaint -- and did not include minors.

And here we have minors. We have a child who is considering gender reassignment and thinks about suicide. That is Pia. We have a child who lives in fantasy land. That is Savannah. We have one whose parents have shielded her from the knowledge of the image downloading, and that is Violet.

And when we see the state that Pia is in, we understand

the good reasoning that the parents have done this. And then we have Sierra who is 19 years old and who has been judged to be an incompetent, and a guardianship has been entered for her because she is unable to understand and take care of her own affairs.

So we submit that none of these children should be subjected to deposition in any way. And because also of this ongoing nature of the crime, Dr. Cooper informs us all that Mr. Balogh will take on the persona of his client in the minds of the Plaintiffs. And worst yet, probably the persona of the original hands-on abuser.

And that's sad to say, but it is the nature of this image. And I'm sure that Mr. Balogh will tell the Court that he will be a nice person and be as gentle as he can and that he has had experience representing child sex abuse victims, but we are still facing this problem.

And Mr. Balogh has seen all these images. Do we tell our clients that Mr. Balogh has seen images of their private parts, their vaginas? And he talks about Mya being oblivious to all of this because she thinks it is anonymous. And yet we know that the pictures and Mr. Curtis' collection shows her full face and her vagina as well. And are we to tell her that he has seen that as well when we prepare her for the deposition?

I'm at a loss, Your Honor. And I -- we ask for a protective order to prevent this from going forward.

THE COURT: All right. And just to be clear, you sort of parsed out the beginning and then sort of at the end talking about the difference between those who are still minors and those who were minors at the time of the crimes.

And if your arguments as to a protective order against depositions apply to everyone, your arguments regarding those who are still minors are in -- sort of in addition to your proportionality argument, correct, and for the harm to the -- to those minors; correct?

MS. HEPBURN: Exactly, Your Honor.

THE COURT: Okay. And then in addition to that, you're -- you are arguing that the issues will be limited essentially to identity only and that, you know, for that, you don't need depositions; but those -- that that can be -- that information can be gotten through other things like request for production or interrogatories and things like that.

And you pointed to some of the records from the previous proceedings and criminal proceedings; is that correct?

MS. HEPBURN: Yes, Your Honor.

And also, I mean, if they want depositions, you can depose people other than the direct victims themselves on the identity issues. Certainly the parents --

THE COURT: Like the parents or guardians.

MS. HEPBURN: -- or guardians, yes.

THE COURT: Okay.

MS. HEPBURN: Or law enforcement, Your Honor.

Each of these child porn series have the law enforcement point of contact who are tasked to come into criminal cases and provide identity testimony.

THE COURT: Okay. All right. All right. So I will hear from Counsel for Defendant.

MR. BALOGH: Thank you, Your Honor.

First, I want to start, if I may -- hold on. Let me put that note in front of me -- by adding a couple of things to the record.

And before I get to the specific three issues you were just discussing at the end -- the three issues under consideration today -- I want to stay with the overview of the case and what is important.

Because I think one of the key issue that Plaintiffs argue is they don't have to prove that they suffered any damages and that by proving a violation, a conviction, they prove they are necessarily injured. And no case holds that.

What *Ferber* and *Osborn* recognize is that child porn can be outlawed. There wasn't a First Amendment defense. There was a narrowing construction that was applied in *Osborn* to make it past constitutional muster. And there was a recognition that people who are victims of sexual abuse and who have their abuse recorded are victims and do suffer injury.

It doesn't mean every person suffers injury from every

distribution. It doesn't speak to any individual fact component. It is talking about the general societal rule to permit a criminal statute.

And when we look at what Congress did with 2255, not only did it define that they have to prove there was a violation of a predicate and they suffered personal injury as a result, when Plaintiffs say that Congress meant those to be the same things, they overlooked 2255(b).

And 2255(b) is the statute of limitations. And how it reads is as follows: Any action commenced under this section shall be barred unless the Complaint is filed one, not ten years after the date on which the Plaintiff reasonably discovers the later of, capital A, the violation that forms the basis of the claim or, capital B, the injury that forms the basis for the claim.

So Congress again in the statute has declared that violation of the statute is one element and that has a triggering provision, and injury arising from the conduct -- that is, the violation -- is a different element. And there are different things that have different showings.

And when we talk about the other Plaintiffs' case, ***Doe v. Hedgepeth***, it is a summary judgment case; but it only talks about civil lawsuits. The point of ***Hedgepeth*** is stopping collateral estoppel and restitution -- that's the ruling -- because the parties are entitled to litigate their case.

And, respectfully, while the Plaintiffs say they are fine with giving discovery -- it is about proportionality -- I respectfully disagree that's how they are treating this case. If you look at both the declarations about why they want the protective orders or want the Motions To Compel to be denied, it is about anything in this case hurts them.

Lily tells us and Jane Doe tells us by responding to discovery requests, I haven't evoked harm against them. I am harming them now. It caused them pain to follow up with civil discovery.

But the obvious retort is they chose to bring the case. And when the guardian talks about how she is acting in the child's best interest and she has made the balancing to sue and have her charge suffer through this discovery, that may well be her choice. But I don't think it is appropriate or fair to place the blame of that on the Defendant who was hailed into court and is simply seeking to invoke his discovery rights to address a valid part of the case.

Were any of these Plaintiffs or any particular Plaintiffs injured as a result of my client's conduct? The statute twice says they have to prove injury. And I want to explore injury which is fair game.

The second thing I want to add to the record is Plaintiff's Counsel James Marsh has provided a declaration, but he is not here on the phone; but he is Plaintiffs' Counsel.

He wrote a law review article about 2255. And here is what Mr. Marsh said in that article -- let me give you -- I will give you the quote first. And I believe he cited it in his brief -- I think he cited it in his declaration, but I will give you the full cite anyway.

The quote is: The notion that distribution, transport, sale, receipt or possession of child pornography by unknown strangers causes personal injury seems much more difficult to conceptualize and prove.

He later says: Once a Plaintiff has proven personal injury, they are entitled to recover the actual damages they sustained and the cost of the suit including reasonable attorneys' fees.

That is an admission by his like that he interprets the statute as I do, which is you have to prove injury, which will be difficult in certain cases like this one.

The citation is -- the name of the article that Mr. Marsh published is Marsh's Law: A Federal Civil Remedy For Child.

It may be found at 61 Syracuse Law Review, 459. And the page numbers I was citing Your Honor to may be found at -- hold on I'm scrolling back down -- may be found at page -- excuse me --

(Pause in proceedings.)

MR. BALOGH: -- page 20 and 21 of my citation, the last two pages.

The other thing Mr. Marsh says in the final section, which he entitles Roman numeral 8, the Personal Injury Requirement -- Mr. Marsh -- again, Plaintiffs' Counsel in this case -- says as follows: Quote, in order to obtain statutory damages, a Plaintiff must show that she suffered personal injury as a result of Defendant's predicate act. According to Black Law Dictionary personal injury includes any harm caused to a person, bodily injury, an invasion of a personal right including mental suffering.

Again, that is a confession by Plaintiffs' Counsel that I am correct in my interpretation of the statute.

So before I move on to the three points, I also want to address the distinctive feature of this case.

Mr. -- the Defendant was arrested in San Francisco International Airport with media that was seized from him by the Government. He was traveling from abroad. That media was seized upon his entry to the United States.

He ultimately pled guilty that some of that media contained child pornography. They've never identified any claimant in that case as actually being in his possession, and equally important it has never been established the matter of fact that he ever viewed these pictures at any time in any way at all.

And that's the important fact because as ***Paroline*** says -- and I would ask -- I would urge the Court to read closely --

Paroline establishes that that Defendant saw the videos and viewed the videos and it triggered this restitution basis on that criminal penalty on that finding that *Paroline* was guilty of viewing their images.

That is not true in this case. And it is an open question as to whether or not sealed data in a drive that has never been viewed can harm another person in any way, shape or form under any theory of damages much less can harm them before they know about it or if they never know about it. These are fact questions.

And we have submitted a declaration from Hy Malinek that demonstrates, one -- many things that Plaintiffs' Counsel has said -- which is obviously women who have suffered at the hands -- of sexual abuse by usually -- particularly in this case their fathers, some their uncles, for years on end and are forced to do horrible things are traumatized by that and horribly so. And I don't take any truck with that.

What Dr. Malinek also recognizes is that how people are harmed by traumatic events varies by individual, varies in time and is unique to the circumstances presented.

And that's why Mya's quote becomes so powerful. Because when Mya asked at that time whether she was harmed by downstream viewers -- not down-loaders, downstream viewers of it, she said no. She doesn't have a problem with it. She rationally understands it is anonymous, and it doesn't harm

her.

That confession is enough on its face to get to a jury on liability. Did she suffer personal injury?

And for the same reasons we want to explore that same question with all the Plaintiffs to understand if and how they articulate how my client's conduct caused them an injury.

On this point, it is also -- we will go back to *Paroline* -- important to note that *Paroline* itself -- you know, the Plaintiffs' lawyers in this case. Mr. Marsh participated in -- they argued to the Supreme Court that the damages to their clients -- in that case Amy -- could not be divisible. They were indivisible. Whether it happens before or afterwards, that they -- that all downstream -- down-loaders caused complete harm.

And the Supreme Court said clearly that question is debatable. That there is no firm answer. And so we are at the stage now -- we are not at summary judgment out of the gate. We are at a place where we are at the discovery stage of a case that Plaintiffs chose to bring where they are seeking $2.25 million plus attorneys' fees. We are entitled to explore the elements of the offense they must prove, and that's what we are seeking to do here.

So let me maybe have one moment, Your Honor, before I move on to the three pieces.

THE COURT: Sure.

(Pause in proceedings.)

MR. BALOGH: Thank you, Your Honor. It is challenging to work at home and not the podium. I don't know why I'm not as good at it yet. Probably lots of practice, but it is just taking me one more second.

(Pause in proceedings.)

MR. BALOGH: So let's talk about the right to individual discovery under three issues.

The first is have we established that they have to prove some quantum of damage that they were, in fact, damaged?

No case says that in a civil case that is decided for these individuals as a matter of law.

Related to that, I think the -- I don't think Ms. Hepburn has been faithful to Judge Illston's ruling and what happened in the criminal case.

What happened in the criminal case was we asked -- they -- the Claimants made a restitution request. And we asked the Government for their identities so we may vet them.

And the Government agreed that, of course, that is the type of information. They have to prove they say who they are. Anonymous people showing up with anonymous names saying "give me money," the Defendant -- because it is part of the criminal process -- has some procedural tools including investigating those claims and assessing those claims.

Many of the claims that were presented in this case were

presented for years with victim impact statements or restitution analyses that predated Mr. Curtis' alleged conduct by years.

And despite the -- many of these requests, sort of ended up what had happened to the Claimants -- what the Claimants alleged happen to them; the types of photographs that were taken and the types of abuse. And the request did not pin down to: Well, what did he possess and was it viewed? What was there? And that was the assessment that ***Paroline*** directs us to make.

And ***Paroline*** had directed the Court to accept a number of factors, the number of photographs, the nature of the depictions, whether someone can be viewed on anonymity versus the recognition question. And there is more than that under ***Paroline***. I commended you to the last page of that opinion by Justice Kennedy.

And the Government agreed that we could get the identities, and Judge Illston so ordered.

Immediately after that, the Government contacted Ms. Hepburn and Mr. Marsh and told them exactly what I just told you. They are going to turn these over unless they object. And Plaintiffs objected and said they didn't want to do that. And they -- they would not agree to it in any way, shape or form; and they demanded the Government proceed without that.

And that put the Government in a pickle. And so the Government came to us, and they told us they were going to -- not going to comply with the order. And if we wanted to enforce compliance, we could try to or we could try to negotiate the case.

At this point we had genuine beliefs that several of the Claimants didn't deserve any restitution even if we presumed they are who they are. That's because there was one picture that didn't identify them or no pictures at all because the Government had given multiple positions regarding certain Plaintiffs whether or not their photographs were viewed.

And we agreed to resolve that case only if it did not resolve the question of identity.

And the Government agreed. And the stipulation reads as follows -- that Judge -- that Judge Illston entered reads as follows: Whereas the Defendant does not concede that any of the Claimants is a statutory victim and nothing in this stipulation shall be construed as any admission by Defendant, in any proceeding, by any party, and this stipulation is presented pursuant to Federal Rule of Evidence 408 and whereas the parties nevertheless agree that to conserve judicial resources, bring about a speedy resolution of this matter and avoid further litigation, the Court upon approval of this stipulation, may without objection from the Defendant enter an order for restitution in the amount set forth below.

Thus Ms. Hepburn is fundamentally incorrect when she says the amended judgment that provided restitution establishes in any way, shape or form that any of the Plaintiffs -- even if they are who they say they are -- were, in fact, victims of the predicate offense.

There is nothing in that record. And that is quite different than every other case they have brought under 2255 where the Defendant had in the underlying litigation made admissions and otherwise established that the Plaintiffs were victims and harmed by his conduct.

That's a huge difference here, and a difference -- and a difference that matters in the litigation because now those are predicates which the Plaintiffs must prove, and that's part of the reason why we are entitled to discovery.

I want to be clear about the limits of what we gave up. We had claimed at that point -- and the Government had supported us -- that there were no images of Mya or Savannah. There was only -- only images of either Tori or Erika. And others had de minimus photos that could not identify anyone including Skylar, Sally, Amy, Jessica, Violet and Maureen.

That's nearly half of the Plaintiffs. That is more than a million dollars in damages on questions that have not been answered or addressed or even discovered. And we are seeking discovery to that further end.

So let's go to the three categories, if we may now,

Your Honor.

One, the first category is documents that are either school records or investigation records, records that relate to the underlying alleged hands-on abuse -- I was damaged by this -- or records that relate to other damages arising from similar circumstances.

And this is those -- goes to the factual question, which is sustained by Malinek, of depending on the nature of the abuse and timing and the Plaintiffs' testimony, whatever damages they may suffer may, in fact, be caused by someone other than Randall Curtis.

And if those facts are developed, a jury or fact-finder could determine that the damages they complained of -- either based on the events themselves previously or the timing of it -- for example, the disclosure of the original distribution and not knowing about Defendant's alleged actions ten years later -- might not have moved the needle at all -- that would support a finding of no viability. And Mr. Curtis is entitled to pursue that kind of -- that kind of -- that kind of discovery -- excuse me -- so he may defend the case on a no-damages theory.

What the Government -- what the one piece of that -- so that's one piece of it. And that relates fundamentally to the damages theory I have been espousing this morning in my briefing.

The second issue is do we have the right to obtain discovery regarding money sought and monies obtained by the Plaintiffs?

And the confidentiality provision is in the bar. Everyone knows that court process overcomes a confidentiality provision. Every settlement -- proper settlement says it is held confidential. And if you get processed, you have to alert the other party or the party that wants to keep it confidential, so they can make application to the Court to keep it confidential because confidentiality is not a recognized basis to avoid otherwise discoverable information.

And that is exactly what ***Hickman*** says. We -- both parties get the other parties' records. ***Hickman*** says that clearly.

And so in this case we think that, first and fundamentally, that goes to images -- that goes to motive to lie. Seeking money and obtaining money for claims is an incentive to lie and exaggerate and is a time-honored recognition that that is the kind of discovery we can find to determine whether the victims are telling the truth when they make any claims about my client if they ever, in fact, make any claims about my client other than you were convicted and we believe you possessed our pictures and nothing else.

And as we know from the ***Cleland*** case I cited to you that other judges -- at least in the restitution context -- understand that claims for money need to be scrutinized.

And here, I think that dovetails with the credibility issue because from what I have seen in the -- of the restitution requests, they are artfully written and not necessarily accurate when they describe who they are, why they are seeking money, especially when compared to the 2255 cases they have been and continue to bring and the omission of references to them. And we think we are entitled to explore that.

We also think we are entitled to explore that for related examples. For example, under the Seventh Amendment in the civil case, Mr. Curtis has the right to a jury trial. But if this statute reads as what the Plaintiffs say it reads -- which is all we do is establish that you are the convict -- then we automatically get $150,000 -- trial by fiat, if you will -- we contend that it is an unconstitutional civil fine.

And the Supreme Court in multiple cases had recognized that certain penalties -- even civil penalties -- if they are not in proportion to loss or damage may be unconstitutional and can be stricken down.

And the cases I would cite you to are ***St. Louis IM and X. Railway Co. versus Williams***. That is 251, United States 63. I would recommend page 66 discussing that -- those limits.

I would also -- that case goes further. I would recommend pages 67 which discusses the same limitations.

I would also -- excuse me -- recommend ***Six Mexican Workers***

versus Arizona Citrus Growers. That may found at 904 F.2d 1301, pages 1309 to 1310, which recognizes the same concept; that certain civil penalties and certain laws can be written in such a way as to qualify unconstitutional civil fines.

The equitable defense to the Judge to assess whether an award would be unjust is a time-honored equitable defense, and we should be entitled to gather evidence to make that representation to Judge Hamilton as a matter of law, as a matter of fact.

And so for these reasons, their request for money are relevant to this both what they sought and receive. And I will address their main complaint there is proportionality.

And, respectfully, their complaint is even though these are our documents and even though we are these people's lawyers for years and even though we are tasked with maintaining client files, we have chosen to do so in such a way that it is not easy for us to gather the materials that we gather weekly.

And I don't understand that response. Electronic databases are easy to organize. And if by their own choices have made it difficult for them to comply with documents in their possession that are obviously relevant, that can't be used against us because that was their choice and continues to be their choice.

Indeed, this case has been pending for almost -- for well over a year. And they are telling the Court that in the time

of this case they have continued to ignore that responsibility and haven't even maintained those documents in a readable, accessible way by their choice; and that their choice should impinge upon Mr. Curtis' discovery rights.

And, respectfully, I think that is backwards. They are aware of their discovery responsibilities. They are aware of their preservation and maintenance responsibilities. And these are their documents. And it shouldn't be too much to ask for us to see.

And if they want to go back and say each letter is a record of -- you know, they get updated over time, if they want to get us a copy of each one template that was used and then just a list of the cases that it was submitted in, that would be a -- a natural breaking point to get us the information to see what are the representations they make in pursuit of money.

It is almost a predicate of a fraud case. When you seek money and use the wires to get money, we get to assess whether you have been truthful as a way of assessing your honesty. And that is what we are requesting here.

If I may move to what I think is the heart of the matter, their largest complaint, is the request for deposition discovery.

And, again, I don't think they get the history exactly right. You are right. We did bring it up to Judge Hamilton in a hearing without briefing. And Judge Hamilton's response was

sheer rejection.

Rule 30 says if you choose to sue somebody, you have to sit for deposition. A plus B. You can't sue to get money and then say you are immune to the system which you have invoked.

It is like jurisdiction. If you show up and invoke the jurisdiction, you become subject to the jurisdiction.

Here, you show up and sue. You are subject to Defendant exploring the bona fidities (sic) of your claims because you have chosen to sue.

And what Lily says and Jane Doe says and Violet's mother say in their declaration is they find that outrageous. They don't understand how anyone could demand -- and this is a quote I think from Lily -- that they prove what they claim.

And I don't understand what lawyer could have told them they wouldn't have to prove what they claim. But their disbelief that invoking the civil justice system, which has obligations, that is not a fair understanding.

They brought the case, and now they should be subjected to allowing Mr. Curtis to develop evidence to defend against the case.

And so, Judge, when we made the original motion to approach the issue, Judge Hamilton could not be more clear. She said as follows: Unless Plaintiffs present a Ninth Circuit case that says victims of this particular kind of crime cannot be deposed, I would permit the Defense to depose them -- them

or their guardians, if they are minors. I don't need any more motions unless there is a case exactly on point.

So that resolved the matter of whether depositions were available. But it didn't. Plaintiffs didn't relent and they saw we filed a motion.

And, again, the Court ruled for Defendant and said that they had to sit for deposition.

Now, true enough, she linked part of her ruling to punitive damages. And true enough the Defendant -- the Plaintiffs have now withdrawn that claim? And now there are no punitive damages.

It in no way overcomes the ruling or would be a basis for reconsideration of the ruling which is essentially what they are asking Your Honor to do.

I would agree that they haven't done that with respect to the minors. No one has moved -- this is the first time they are moving for a protective order of minors. And that issue remains live.

We have given a citation to a case that is to permit minors. We have tried to draw a fair line, which 15 years old is the cut-off; but the minors -- the depositions of the adults has been resolved.

And for that live issue, we think, again, if they have chosen to bring this case, calling upon them to answer questions, is not a heavy lift.

And we know from their history that in James Marsh -- James Marsh's declaration as well, they sit for interviews all the time. They -- some of the Plaintiffs go to conferences, and they speak at conferences publicly about what happened to them at the hands of their abusers; how they feel about the current state of the world; about their feelings and emotions.

And if they are able to do that voluntarily when it suits their purposes, they most certainly need to do that pursuant to deposition rights when they have chosen to bring a case.

It cannot be the ruling of the Court that they can only talk about it when they say they feel sufficiently comfortable; but when the Defendant, who they are seeking money from, wants to get information, that would be fundamentally -- that they can no longer stand that.

And while I have no -- I disagree with Plaintiffs' characterization of how I would depose them wholeheartedly, I think it is a fine example of Ninth Circuit Rule 3.7, questions aren't evidence. Only answers to questions are evidence.

And so when Plaintiffs' lawyers say to me: You are going to do X, Y and Z; and you are going to be horrible. And I say: I'm not going to give you my deposition outline. I believe I get to depose them on certain issues, that's what that means. That doesn't mean I -- in any way, shape or form -- suggest that I'm going to do what they say. I decline to answer, and they can't put allegations in my mouth because it suits their

end.

And I think what is fair game in this case is identifying the length of the abuse, how -- the alleged abuse; how the alleged abuse affected them; whether it occurred temporally; when did they learn about the distribution available on the internet; how did that affect them; if and when they learned about my client's conduct, how did that affect them. For them to describe any alleged injuries or damages that arise under 2255 and any similar or related damages that a fact-finder may consider ultimately came from a different source but not from any conduct that my client did.

And so I think that's my ragtag presentation, as best I can, I'm happy to answer questions from you. Let me just check my notes if I may.

Oh, the last thing I just want to say is the two cases they cited summary judgment -- I believe it is called ***Rocket*** and -- ***Coldslap*** (phonetic) -- it is a Eastern European name, I believe. I don't know how to pronounce it. Those cases are both about summary judgment against the direct abuser of a child, full stop. That in no way, shape or form relates to the allegations in this case.

And I guess the very last thing I will say is: In their own reports -- and we have cited them. I think it is paragraph 3 of my declaration. We give the pin cite -- when their own psychologist evaluated them before any Plaintiff was aware of

any conduct regarding the distribution of their alleged images, all those psychologists said the same thing. We have to forecast future damages because they don't know.

And that is, by their agent also, a confession of they have not been injured yet. We believe they will be injured in the future.

And that may or may not be true as far as whether they will be injured in the future, but it is absolutely true that they have confessed the notion of injury -- both as a legal basis through Marsh's statement, through a natural reading of the statute -- and as a factual basis tethering it to they have to know about the distribution.

These are live issues for Mr. Curtis to explore in discovery and to present at trial. And to short circuit discovery now such that we don't really get any when we got the Rule 26 notices, Your Honor, the Defendant didn't identify any fact witness, not one other than the participants in the underlying criminal case and an expert -- their expert. That's it.

And they didn't identify any -- any discovery other than matters from the criminal case, notices from the Department of Judicial Notice System and the expert materials regarding their expert. They didn't offer any materials whatsoever.

So for them to suggest -- and I have been fighting now for this discovery for -- I filed my request last September, so for

a year -- to get to where I am; to have five amendments that still don't get me much.

For them to suggest that it is a factual matter -- they're honoring my discovery rights and believe I have them and just want to circumscribe them in a narrow way -- I don't think that is an accurate assessment of what has gone on here.

The essence is they don't believe I'm entitled to discovery for the reasons they cited in their declaration. They believe because that because they claimed they were victims in a criminal case, they win. And nothing else can happen in this case. That is just incorrect.

And we ask the Court to grant us the documents and the depositions we have requested. And I will answer any questions Your Honor has.

THE COURT: All right. So, you know, the request for a protective order, the burden is on the requesting party. So I will give Plaintiffs a brief time for reply.

MS. HEPBURN: Thank you, Your Honor.

To correct a couple of factual misstatements, first of all, there is only one Plaintiff who doesn't know that her images are distributed, and that's Violet who is still a minor.

And to point out for the Court in the transcript of Judge Hamilton's off-the-cuff remarks at the time of the 12(b)6 motion, she spoke on page 54 specifically about depositions of Plaintiffs, the guardians for the minors.

There was no discussion at that time nor at the time of the prior discovery order of deposing the minors at all.

I would submit that all of the Defendant's protestations about credibility of the Plaintiffs and being able to test that go to the issue of damages and the context of proving actual damages.

It does not go to identity. I mean, how can you lie about your identity? And we can bring in people of -- you know, to talk about that and where can we have an expert who is viewing the images again to determine, you know, that, they are, in fact, of the Plaintiff. And so --

Again, if this is a case where the sole issue is identity, then all of this talk about credibility of the Plaintiffs really falls by the wayside.

What is the point of having a liquidated damages provision if we all have to go through all of this and these folks have to be poked and prodded and intruded upon again? Why did Congress provide that?

I point out that the Marsh article that Counsel cited to was published in 2011. That is before the 2012 ***Boland*** case, before the 2014 ***Paroline*** case, before the 2018 Congressional findings in the Amy, Vicky and Andy Act.

And, again, I would -- I also point the Court to the ***Paroline*** case where causation was the primary issue. The injuries were the primary issue for decision. And without

equivocation the findings were, by the quote, all the plurality opinions that these children, these young adults, are harmed by possession of their images.

There is no case that holds that for a criminal conviction that a Defendant must be proven to see and to view and whatever the image is. And under 2255 says the predicate offense is that the person has committed the crime and committed the violation. And that is what is proven by the conviction.

There is no requirement in 2259 for purposes of restitution that the Government prove that a Defendant has viewed the image of a particular victim. So Defendant is just off base on that.

So, again, I point to the fact that we are going for liquidated damages here. We acknowledge the need to prove identity; but we feel that as a matter of law, once it is shown, that it is shown that these Plaintiffs were harmed by Mr. Curtis.

THE COURT: All right. Everything has been well presented in the papers; certainly by the parties and then either emphasized or pointed out here on the record.

So I believe I have all I need to move forward with the -- with an order which I expect to get out in the next couple of days. All right?

MS. HEPBURN: There is one --

MR. BALOGH: Judge --

MS. HEPBURN: One more thing I just -- I should have pointed out for the Court as well that there is the pending motion by Plaintiffs to strike affirmative defenses. Just --

THE COURT: Right.

MS. HEPBURN: -- just to remind the Court.

MR. BALOGH: If I can --

THE COURT: I did see that.

MR. BALOGH: Your Honor, if I can say one more thing, Your Honor. I will be brief.

THE COURT: All right.

MR. BALOGH: My response is I think -- I just don't think Ms. Hepburn understands my argument.

I absolutely agree that the predicate violation here does not require viewing by the Defendant, and that 2259 doesn't require viewing by the Defendant. And that, perhaps, explains why there are no such admissions and no record was made.

But our position -- and I think Ms. Hepburn gets this. I think we are just talking past each other a little bit -- is that the elements of proving the prior violation included Plaintiffs -- which I think is what she is saying is the identity issue is one element -- but proving that they suffered personal injury as a result, I think that's a second element. And that element has been listed again in the statute of limitations. And we want discovery on that element.

And there is no such thing as a victim as a matter of law

in a civil case. They may be -- if they proved identity, they might be victims of the crime in a criminal case; but it doesn't prove personal injury. And no case says that.

And as the Supreme Court and the Ninth Circuit repeatedly warned the Courts: Questions that lurk in the record and haven't been submitted for submission are not precedential.

And none of these -- all of the cases they are relying on are the -- the criminal case they are relying on are criminal cases talking about restitution, not about the 2255 showing of proof.

And even in the copyright case, you still get discovery on damages because it is related to proportionality. And we have established how proportionality relates to at least some of our defenses including the constitutional defenses.

And since the Court is going to be guided by constitutional avoidance, which means Judge Hamilton is going to need to try to avoid the constitutional questions if she can -- we are entitled to develop the factual base of our case so we can make an actual presentation to her and have her decide the issue.

And that's all I wanted to add. I thank you for your patience.

THE COURT: Well, I appreciate that. And I understand their response to that regarding the liquidated damages and the purpose of it.

So I definitely have everyone's point on that. So I appreciate that.

All right, folks.

MR. BALOGH: Thank you.

THE COURT: I will get the order out and -- and hopefully get it in a couple days. That way you guys can have that headed into the arguments in front of Judge Hamilton on the other issue. So --

MR. BALOGH: Thank you, Judge. We appreciate it.

MS. HEPBURN: Thank you, Your Honor.

THE COURT: All right, everyone. Have a great day. Thank you.

(Proceedings adjourned)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a true and correct transcript, to the best of my ability, of the official electronic sound recording provided to me by the U.S. District Court, Northern District of California, of the proceedings taken on the date and time previously stated in the above-entitled matter.

I further certify that I am neither counsel for, related to, nor employed by any of the parties to the action in which this proceeding was taken; and, further, that I am not financially nor otherwise interested in the outcome of the action.

DATE: Monday, September 14, 2020

Marla Knox

Marla F. Knox, RPR, CRR, RMR
United States Court Reporter